and translators will be afforded more flexibility in demonstrating non-interference with other NTSC and DTV stations -- a flexibility that will mean less or delayed displacement and greater ease in obtaining new channels. Thus, to take one example, LPTVs and translators will be permitted to continue operations on all existing television channels until a displacing DTV station or, in the case of channels 60-69, new primary service provider actually is operating and subject to interference.

The Commission should not scrap or drastically revise its DTV table to give co-equal primary accommodation to LPTVs and/or translators. Petitioners' claims that LPTVs could not have anticipated displacement by DTV implementation are beside the point. Secondary status means being subject to displacement. The rules of the game have been clear from the start and have never changed.

Thus, LPTV and translator licensees have been well aware that "[t]here is no guaranteed right or expectancy that a low power television or television translator station displaced by the land mobile radio service or by a full-service television station may operate on another vacant channel."[51/] From the beginning, "proposed investors in LPTV operations [have been] given explicit, full and clear prior notice that operation in the LPTV service entails the risk of displacement."[52/] In addition, "LPTVs and translators have been

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51/ LPTV NPRM II ¶ 19.

52/ Petition of Community Broadcaster's Assoc., 59 Rad. Reg. 2d (P & F) 1216, 1217 (1986). See also Second R&O at 3351 ("the low-power service thus has had ample notice that it would have to yield to any full-service stations, without exception for the specific mode in which the full-service station transmits."); In re Satellite Stations, 5 FCC Rcd. 5567, 5569 (1990) ("LPTV stations, like translators, are a secondary service, unprotected against new television allotments. They are not generally considered as a service in allotment and licensing proceedings.").

on notice since 1987 that ATV might increase demand for broadcast spectrum."[53/] There is simply no basis for overhauling the DTV table to afford LPTVs and translators primary status.

B. The Commission's Decision Does Not Violate Section 307(b) Of The Communications Act.

Petitioners Skinner Broadcasting, Inc. and the Community Broadcasters Association ("CBA") assert that the displacement of LPTVs resulting from the DTV Allotments/Assignments constitutes a violation of Section 307(b) of the Communications Act, which provides:

> In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.[54/]

These petitioners assert that "[b]ecause alternatives obviously exist which would reduce the number of displacements, the Commission has not complied with the judicial and legislative mandate that it consider reasonable, less-burdensome alternatives and specifically address reasons for its failure to adopt them."[55/] This assertion is both factually and legally incorrect.

The petitioners do not in fact contest that LPTVs and translators are secondary services with respect to digital television. Rather, they base their argument on two

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53/ Second R&O at 3351 n.113.

54/ 47 U.S.C. § 307(b).

55/ Skinner Petition at 8.

misconceptions regarding the application of Section 307(b). First, they contend that the secondary status of LPTVs and translators is irrelevant to the Section 307(b) analysis. This position is contrary to the longstanding interpretation of Section 307(b) adopted by the Commission and upheld by the judiciary -- namely, that the mandate of Section 307(b) is fulfilled through the Commission's regulation of primary services. Throughout the history of the LPTV and translator services, the Commission has considered repeatedly and at length the implications of authorizing these services on a secondary basis, including the implications of secondary status for Section 307(b) purposes. In the instant proceeding as well, the Commission considered comments urging it to upgrade the status of LPTVs and translators, and ultimately determined that the public interest would best be served by maintaining the secondary status of these services throughout the DTV transition.[56/]

Second, the petitioners urge the Commission to apply Section 307(b) in a single-minded manner, elevating the preservation of LPTV stations in particular communities above all else, regardless of the resulting cutbacks in wide-area service to many more rural areas. But Section 307(b) does not require the Commission to disregard the greater public good in order to preserve a particular community's service at all costs. The D.C. Circuit affirmed this basic principle in the DBS context in NAB v. FCC. Rejecting a Section 307(b) challenge, the D.C. Circuit concluded: "The ultimate touchstone for the FCC is thus the distribution of service, rather than of licenses or of stations; the constituency to be served is people, not municipalities."[57/] The court explained:

[56/] See Second R&O at 3366 (Appendix B, Regulatory Flexibility Analysis); Polar Broadcasting, Inc. v. FCC, No. 92-1597 (D.C. Cir. March 24, 1994).

[57/] NAB v. FCC, 740 F.2d 1190, 1198 (D.C. Cir. 1984).

> Given this obligation to facilitate expansion of this country's communications network and in light of the broad grant of authority delegated to the FCC to deal with "the rapidly fluctuating factors characteristic of the evolution of broadcasting," it would be anomalous to read the Act to prevent the FCC from authorizing an innovative system of technology capable of conferring substantial benefits on all Americans.[58/]

In the instant proceeding, the Commission -- faced with implementing a new technology -- determined that the American people would best be served by maintaining the priority of full-service stations throughout the DTV transition, and we firmly support this determination.

1. Historically LPTVs' Secondary Status Has Been Consistent With Section 307(b).

Indeed, the Commission specifically considered its Section 307(b) obligations in establishing the LPTV service, and found that these obligations were fulfilled by its existing distribution of full-service television stations -- those same stations to which the Commission has now given priority in the transition to DTV. The Commission explained:

> [T]oday's broadcast services may be considered quite mature, in a Section 307(b) sense. The Tables of Assignments for FM *and television stations*, §§ 73.202(b) and 73.606(b), and the allocation scheme for wide-area AM stations memorialized in § 73.22, *are intended to fulfill the Commission's Section 307(b) mandate.*[59/]

The Commission noted that "the existing array of television channel utilization will force low power into less well-served areas" and noted:

> The Television Table of Assignments distributed the available television allotments between large cities and less populated areas in a manner

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[58/] Id. (citations omitted), quoting FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940) and citing Wold Communications, Inc. v. FCC, 735 F.2d 1465, 1475 (D.C. Cir. 1984).

[59/] LPTV R&O at 505 (emphasis added), citing Logansport Broadcasting Corp. v. FCC, 210 F.2d 24 (D.C. Cir. 1954); Loyola University v. FCC, Nos. 80-1824 and 80-2018, 50 Rad. Reg. 2d (P & F) 1297 (D.C. Cir. 1982).

> that balanced the natural gravitation of stations to large urban areas with high population densities with the need to reserve some spectrum capacity to service the less profitable, low population density areas of the country.[60/]

As the Commission explained in initiating the LPTV service, "this existing station distribution pattern, coupled with our requirement that low power stations protect the Grade B contours of all full-service stations, will result in the vast majority of low power authorizations being granted outside the top 50 markets."[61/] The Commission thus concluded that "the assignment policies we are adopting for the low power service automatically will accomplish the concern we formerly addressed in our Section 307(b) hearing contests."[62/]

The Commission determined that "the basic regulatory structure of this new service makes the application of our full-service station Section 307(b) practices inappropriate."[63/] The Commission emphasized that it did "not intend this to constitute a relaxation of [its] concern for the Section 307(b) mandate" and stated: "We remain committed to Section 307(b) determinations in the primary broadcast services. However, we believe that implementation of the low power proposal takes cognizance of the existing distribution of services."[64/]

60/ LPTV R&O at 505.

61/ Id.

62/ Id.

63/ Id. at 505-06.

64/ Id. at 506.

2. LPTVs' Continuing Secondary Status In The DTV Environment Is Similarly Consistent With Section 307(b).

The Commission's reasoning in 1982, supporting the determination that LPTVs and translators should continue to develop as secondary services, remains valid today. The Commission has made a general policy judgment that the goals of Section 307(b) are best served by maintaining the priority of full-service stations which, unlike LPTVs and translators, are subject to public interest and coverage area obligations designed to ensure broad service to the public, including small towns and rural areas. The Commission's commitment to service area replication in the DTV transition assures that the balance struck by the Commission in its full-service channel allotments will be maintained.

Claims by the two LPTV petitioners that the Commission failed to fulfill its 307(b) obligations thus are unfounded. The Commission's Section 307(b) mandate does not require a station-by-station analysis of displaced LPTVs and translators resulting from the DTV transition. In the words of the Commission:

> The courts have held that neither Section 307(b) nor our particular past applications express rigid and inflexible standards. The Commission has a great deal of discretion in solving problems attendant to its responsibilities for providing a "fair, efficient, and equitable distribution of radio services."[65/]

The Commission has properly exercised its discretion in determining that the "fair, efficient, and equitable distribution" of television services will best be served by replication of the NTSC service areas of existing full-service stations, even though that policy

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65/ Id., citing Television Corp. of Michigan v. FCC, 294 F.2d 730 (D.C. Cir. 1961); Logansport Broad. Corp. v. United States, 210 F.2d 24 (D.C. Cir. 1954); Federal Radio Comm'n v. Nelson Bros. Broad. Bond and Mortgage Co., 289 U.S. 266 (1933); WBEN, Inc. v. United States, 396 F.2d 601 (2nd Cir. 1968).

results in the displacement of a number of secondary stations. The Commission acted well within its discretionary powers in determining that the regrettable loss of local service resulting from the displacement of LPTVs and translators serving a limited number of small populations was outweighed by the benefits to the overwhelming number of persons across the country who will benefit from the speedy and effective transition to DTV by full-service television stations.[66/]

IV. ALLEGED VIOLATIONS OF THE SUNSHINE ACT DO NOT RENDER THE NEW DTV RULES INVALID.

CBA also argues that the Commission violated 5 U.S.C. § 552b(e)(1) (the sunshine requirement) because it did not issue, seven days in advance, a formal public notice of its intent to consider the R&Os at its open meeting on April 3, 1997.[67/]

[66/] C.f. Amendment of Parts 73 and 74 of the Commission's Rules Concerning Full Power Television and Low Power Television and Television Translator Stations (Memorandum Opinion and Order), 3 FCC Rcd. 1974, 1975 (application of Section 307(b) principles to preserve displaced translators providing only off-air television service for 65,000 people would be "inappropriate and inconsistent with the public interest"); Springfield Television of Utah v. FCC, 710 F.2d 620 (10th Cir. 1983) (in the context of VHF drop-ins, accepting FCC determination that "'the effect of any possible disruption of translator service, in terms of people served, is more than offset by the gain in service realized by the drop-ins.'"), quoting Rule Making to Amend Table of Assignments to Add New VHF Stations (Report and Order) 81 F.C.C.2d 233, 258; Balcones Broadcasting Ltd., 3 FCC Rcd. 2528 (1988) (rejecting use of Section 307(b) argument in case involving displacement of a translator); New Jersey Coalition for Fair Broad. v. FCC, 574 F.2d 1119, 1125 (3rd Cir. 1978) (concluding that "the case law construing section 307(b) permits the Commission to rely on out-of-state stations to meet an area's service requirements" and that "Congress did not intend that each state have a right to a local television station"); id. at 1126 ("The key to the analysis under Section 307(b) is whether the service provided by television stations is adequately distributed to viewers in the several states and communities.").

[67/] See CBA Petition at 7-8.

As CBA knows, however, the statute contains an exception dispensing with seven-day advance notice when the agency determines that its business so requires.[68] While the legislative history of the Sunshine Act indicates that this exception is not to be relied upon routinely, it also makes clear that Congress intended to permit, in some situations, public announcement just hours before, or even simultaneously with, the open meeting in question.[69] In this instance, as CBA itself notes, the Commission made and recorded that determination.[70] Under the circumstances, there are no legitimate grounds for complaint.[71]

Moreover, "[t]he legislative history of the Sunshine Act makes clear that where a failure to comply is not intentional or prejudicial to the rights of any person, it was

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[68] See 5 U.S.C. § 552b(e)(1) (requiring seven-day notice "unless a majority of the members of the agency determines . . . that agency business requires that such meeting be called at an earlier date"). See also CBA Petition at 8 n.8.

[69] See Richard K. Berg & Stephen H. Klitzman, An Interpretive Guide to the Government in the Sunshine Act 48-49 (1978), citing Sen. Rep. No. 94-354, 94th Cong., 1st Sess. (1975).

[70] See CBA Petition at 8 (noting public notice issued on April 3 indicating that "the prompt and orderly conduct of the Commission's business requires this . . . and no earlier announcement was possible"). The Commission has exercised its discretion to dispense with the 7-day notice on numerous occasions. See, e.g., In re Application of WACB, Inc., 88 F.C.C.2d 167 (1981).

[71] CBA notes reports in the trade press that public notice was postponed in order to avoid the "sunshine agenda period." See 47 C.F.R. § 1.1203 (permitting no *ex parte* contacts after public notice). The resulting opportunities to express industry views during the period of postponement, however, could have worked as much to CBA's advantage as to anyone else's. More to the point, however, the CBA has cited no probative evidence of an improper motivation. It was, in fact, common knowledge that there was uncertainty among the Commissioners even at the last minute as to key portions of both R&Os. We are also unaware that any contacts were made during this period regarding LPTV issues. In any event, the CBA's efforts to second-guess the Commission's judgment on this point are misplaced. At most, the Commission's determination that the situation necessitated last-minute public notice will be subject to an "abuse of discretion" standard. See, e.g., WATCH v. FCC, 665 F.2d 1264, 1272 (D.C. Cir. 1981) (alleged violation of Sunshine Act notice requirement subject to "abuse of discretion" review).

not to be expected that an agency would . . . reconsider an action taken or hold another meeting."[72] CBA has not shown that the exception to the seven-day rule prejudiced it in any manner. In light of the fact that (i) the very purpose of this portion of the Sunshine Act is to make the right to attend open meetings meaningful,[73] (ii) CBA concedes that it knew in advance that DTV would be addressed at the meeting,[74] and (iii) CBA is unable to show that it (or anyone else) has been prejudiced, the Commission should reject CBA's argument on this issue.

V. THE COMMISSION SHOULD PROVIDE ADEQUATE DTV-TO-DTV ADJACENT CHANNEL INTERFERENCE PROTECTION.

A number of petitioners expressed concern about unduly proximate DTV-to-DTV adjacent channel assignments because of the resulting interference to the public's service -- a defect that could plague coverage both during and after the transition period.[75] We shared that concern in previous filings but have recently obtained laboratory tests and

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[72] 88 F.C.C.2d at 169.

[73] See Sen. Rep. No. 94-354 at 29.

[74] See CBA Petition at 8 ("[I]t was well-known in the industry that the April 3 meeting was the target for digital television action.").

[75] At least fifteen petitioners expressed concern about adjacent channel DTV-to-DTV interference. See Petitions for Reconsideration of Western New York Public Broadcasting Association; Holston Valley Broadcasting Corporation; Granite Broadcasting Corporation; HSN, Inc.; Educational Broadcasting Corporation; Prairie Public Broadcasting Inc.; Rural California Broadcasting Corporation; Bowling Green State University; Gilmore Broadcasting Corporation; Puerto Rico Public Broadcasting Corporation; Gannett Company, Inc.; WRNN-TV Associates Limited Partnership; Grant Broadcasting Group; California Oregon Broadcasting, Inc.; and Tribune Broadcasting Company.

analyses that more fully document the problem.[76] On that basis, we ask for appropriate relief.

The planning factors used by the Commission for DTV-to-DTV adjacent channel interference were based upon the results of the Advisory Committee on Advanced Television Services laboratory testing conducted by the Advanced Television Test Center. These tests used an extremely linear RF Test Bed which, by design, did not exhibit the out-of-band spurious energy of a typical transmitter. It was recognized at the time that a specification to define the limits of such spurious emissions would be required. In its Sixth R&O, the Commission has specified a mask to control out-of-band spurious emissions that could have an impact on adjacent channel operation within the same or nearby adjacent communities.

Using the mask specified in the Sixth R&O, the effect of the permitted out-of-band emissions on DTV-to-DTV adjacent channel interference has been analyzed and tested in the laboratory by the Advanced Television Technology Center ("ATTC"). The results, documented in Exhibit 1, show that adjacent channel DTV stations assigned to the same or nearby adjacent communities would suffer substantial loss of service area due to marked interference if the Commission's planning factors and specified mask were used. Exhibit 3 contains maps that illustrate the increase in DTV interference as the result of the revised planning factors based on the ATTC data.[77] Exhibit 4 lists the DTV stations that have

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[76] The Advanced Technology Test Center is filing with the Commission today a report showing the results of DTV-to-DTV adjacent channel testing.

[77] The methodology used to create these maps is provided as Exhibit 2.

excessively short-spaced DTV-to-DTV adjacent channel assignments. These cases need to be cured.

In the original petition, Broadcasters pointed out the inadequacy of the Commission's mask to provide protection from DTV-to-NTSC interference and recommended the adoption of a specification based on a weighting function such as the one proposed by the Advanced Television Systems Committee ("ATSC").[78/] In endorsing the ATSC proposal, Broadcasters urged that antenna placement and pattern variations also be taken into account.

Broadcasters urge the Commission to reconsider the emission mask specified in the Sixth R&O, inasmuch as it is not only inadequate for DTV-to-NTSC adjacent channel protection, as noted in our previous filing, but also inadequate for DTV-to-DTV adjacent channel protection. We urge that the fixed mask be replaced by a specification of total average power in the adjacent 6 MHz channel, weighted in the case of an adjacent channel NTSC assignment, but unweighted in the case of an adjacent channel DTV assignment. We endorse the concept embodied in the ATSC proposed standard, but we note the inadequacy of that specification as well, in that it does not address variations in DTV transmitter power and antenna placement and pattern variations.

[78/] See DRAFT ATSC Standard on Digital Television Transmission Measurement and Compliance, Doc. T3/272 (June 23, 1997).

VI. THE COMMISSION SHOULD PRESERVE AND EVEN EXPAND ON A LIMITED AND TARGETED BASIS THE USE OF CHANNELS 60-69 FOR DTV ALLOTMENTS/ASSIGNMENTS.

A handful of petitioners representing land mobile and public safety interests urged the Commission to reconsider the assignment of channels in the 60-69 range to 15 DTV stations, asserting that they will hinder the use of this spectrum by these services.[79/] We firmly support the Commission's use of channels 60-69 to effect the DTV transition. Indeed, as set forth in the Broadcasters' Petition, we urge the Commission to permit expanded but targeted use of channels 60-69 for a limited number of additional DTV assignments in order to prevent the degradation of service and loss of replication resulting from the Commission's current overly-restrictive policy.[80/]

Recovery of spectrum occupied by channels 60-69 was one of the highest goals in the Commission's development of the DTV table. Over the course of this proceeding, the Commission intensified its efforts to restrict the use of channels 60-69 for DTV, resulting in increased interference to the public's future and existing service, less replication, less maximization and fewer opportunities to accommodate displaced LPTVs and translators. We therefore urge the Commission to permit limited exceptions to its general channel 60-69 bar to correct some of the most troublesome allotments/assignments in the Acute Problem Areas identified in the Broadcasters' Petition and to provide adequate DTV-to-DTV adjacent channel protection, as described above.

79/ See Petition for Reconsideration of Land Mobile Communications Council, MM Docket No. 87-268 (June 13, 1997); Petition of APCO for Partial Reconsideration of Sixth Report and Order, MM Docket No. 87-268 (June 13, 1997); Petition for Reconsideration of the County of Los Angeles, California, MM Docket No. 87-268 (June 13, 1997).

80/ Broadcasters' Petition at 21-22.

VII. THE COMMISSION TOOK A PROPER APPROACH TO PUBLIC INTEREST OBLIGATIONS AND QUALIFICATIONS FOR DTV.

Media Access Project *et al.* ("MAP") has petitioned the Commission to reconsider its decisions on DTV public interest obligations and on broadcaster financial qualifications to build and operate DTV facilities.[81/] MAP contends that the Commission erred by failing to adopt, or at the very least to commit to adopt in the near future, new public interest obligations for digital television that are "commensurate with the expanded capacity" of digital television.[82/] MAP's contention is unfounded and premature.

As the Commission stated in the Fifth R&O, the Telecommunications Act of 1996 provides that broadcasters' public interest obligations extend to digital program services.[83/] The Commission explained that existing public interest requirements continue to apply to all broadcast licensees[84/] and indicated that it will consider broadcasters' DTV public interest obligations in a further proceeding, where it "may adopt new public interest rules for digital television."[85/] MAP thus is premature in criticizing the Commission for not expanding broadcasters' DTV public interest obligations and in suggesting that the

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81/ Petition for Reconsideration and Clarification of Media Access Project, Benton Foundation, Center for Media Education, Consumer Federation of America, Minority Media and Telecommunications Council, and the National Federation of Community Broadcasters, MM Docket 87-268 (June 16, 1997) ("MAP Petition").

82/ Id. at 2-4.

83/ Fifth R&O ¶ 48, citing 47 U.S.C. § 336(d).

84/ Id. ¶ 50.

85/ Id.

commission established by the White House[86] to study these very issues should be preempted. The Commission has acted in its discretion to consider these matters in light of the recommendations of the Presidential commission and in light of further knowledge about broadcasters' DTV implementation plans.

Contrary to MAP's suggestion, broadcasters have never argued that public interest obligations should not attach to the digital television service. In fact, Broadcasters stated that they "support the continued application of public interest obligations that attach to the analog NTSC service through the transition period and beyond to an all-ATV replacement service. The existing obligations should attach to the licensee and programming obligations should be satisfied on both the NTSC and ATV channels during the transition. . . ."[87]

With respect to other services, such as subscription and non-program services, operation "in the public interest" should be determined based on the specific services provided. MAP's assertions notwithstanding, there is nothing in the language or legislative history of the Telecommunications Act that evidences any Congressional intent to overturn the Commission's decision in Subscription Video.[88]

MAP's arguments suffer throughout from mistakenly equating Congressional (and broadcaster) intent for all digital broadcast services to operate "in the public interest"

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[86] The Advisory Committee on Public Interest Obligations of Digital Television Broadcasters was created by Executive Order on March 11, 1997, to study and make recommendations on the public interest responsibilities accompanying broadcasters' receipt of digital television licenses.

[87] Broadcasters' Comments on the Fourth Notice of Proposed Rulemaking, MM Docket No. 87-268 (November 20, 1995) at 25.

[88] In re Subscription Video, 2 FCC Rcd. 1001(1987), aff'd *sub nom.* National Ass'n for Better Broadcasting v. FCC, 849 F.2d 665 (D.C. Cir. 1988).

with the intent to impose specific public interest programming obligations.[89/] The Commission simply is not bound by the Communications Act or Supreme Court holdings to issue new public interest requirements "commensurate" with new digital technologies or new digital capabilities (which, in any case, are far from clear at this point). Neither is the Commission bound to adopt more specific public interest requirements at this time. MAP's Petition in this regard should be denied.

MAP's argument that the Commission should have required specific financial showings from broadcaster applicants for paired DTV licenses also should be dismissed. The Commission reasonably has concluded that broadcaster applicants (as opposed to non-broadcasters who have not previously demonstrated their ability to construct television facilities) need only certify their intention to build DTV facilities. Existing broadcasters can be relied upon to construct DTV facilities based on their track record and their need to transition their businesses to the digital world, given the mandatory cessation of NTSC broadcasting and the dictates of the marketplace. Requiring full financial showings before any operations commence would slow down the rapid DTV build-out both the FCC and Congress desire. The Commission can address any financially-based inability to construct DTV facilities on a case-by-case basis.

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The Commission should deny those petitions for reconsideration that would gut or seriously undercut its Fifth and Sixth R&Os. However, these decisions can and should be

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89/ MAP also mistakenly and unfairly equates calls from broadcast executives for government to refrain from First Amendment-sensitive content restrictions and legal arguments as to the legal basis of the public trustee concept with broadcasters' "rejecting their public trustee duties." MAP Petition at 11.

strengthened, improved upon, clarified and more effectively and expeditiously implemented by the Commission's taking the steps enumerated in Broadcasters' Petition. We agree with the Commission that "it is important that these issues be concluded as expeditiously as possible"[90/] and urge the Commission to move swiftly in disposing of the petitions for reconsideration filed in this proceeding.

Respectfully submitted,

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90/ Order Denying Consolidation of Filing Deadlines, MM Docket No. 87-268, DA 97-1481 (Adopted July 14, 1997; released July 14, 1997).

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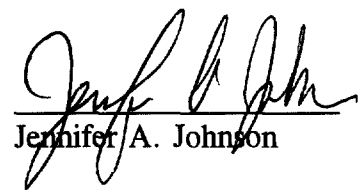
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comment on and Opposition to Petitions for Reconsideration of the Fifth and Sixth Reports and Orders submitted by the Association for Maximum Service Television, Inc. and the Broadcasters Caucus has been served by first-class mail this 18th day of July, 1997, on the persons listed on the following service list at the addresses listed thereon.



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[*/] We did not serve petitioner KM Broadcasting, Inc. because no address was provided on its Petition for Reconsideration and efforts to obtain additional information about this petitioner were unsuccessful.

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